Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 25-35 OF 1989
LC VOHRAH J
3 MAY 1990

Land Law — Caveat — Private caveat filed by respondent in respect of sale and purchase agreement — Subsequent sale of land by mortgagee by public auction — Certificate of sale issued to the applicant as successful bidder — Whether respondent's private caveat could be removed and applicant's certificate of sale registered — National Land Code 1965, ss 267 & 327

This was an application by the applicant under s 327 of the National Land Code 1965 to direct the Pengarah Tanah dan Galian, Johore, to remove a private caveat filed by the respondent in respect of a certain land and also to register the applicant's certificate of sale issued by the registrar of the court on the successful completion of a judicial sale of the land.

The registered proprietor of the land had on 10 April 1980 granted an option to purchase the land to one Shaikh Mohamad who was then one of its directors. The option could not be exercised until after the expiry of five years from 1 April 1980. On 15 November 1981, the land was charged by the registered proprietor to Singapore Finance Ltd at which time Shaikh Mohamad was still a director of the registered proprietor.

Shaikh Mohamad appointed the respondent as his nominee and the respondent entered into a sale and purchase agreement with the registered proprietor on 29 June 1985. Several payments in respect of the purchase price of the land was made by the respondent and on 25 March 1986 the respondent lodged a private caveat in respect of the land.

The land was put up for public auction on 2 July 1989 by Singapore Finance Ltd in a foreclosure action. The applicant was the successful bidder at the auction and on full payment having been made by the applicant, a certificate of sale by the court was issued by the senior assistant registrar but it could not be registered because of the private caveat which had been lodged by the respondent. However, the proclamation of sale in respect of the public auction of the land had a description of the respondent's caveat.

The applicant argued that it was aggrieved by the existence of the private caveat because although it had paid the purchase price in full, it had been unable to register the certificate of sale and contended further that the option granted to Shaikh Mohamad was not a bona fide transaction because Shaikh Mohamad 'as a purchaser cum director of' the registered proprietor should have objected to the charging of the land in favour of Singapore Finance Ltd and that as he must have had either full knowledge or constructive knowledge of the charge when he signed the sale and purchase agreement on behalf of the respondent, its caveat was bad in law and void of any effect and ought to be removed.

Counsel for the applicant also argued that if the court should consider that the respondent did have a caveatable interest then the question of two equities would arise in which instance the applicant having paid the full purchase price and having in its possession the title deed to the land had a better equity as bona fide purchaser whereas the respondent had been guilty of omission in not objecting to the creation of the charge and in not intervening in the foreclosure action.

Held, dismissing the applicant's motion:

(1) As the applicant, not being the registered proprietor, had made the application under s 327 of the National Land Code 1965, it had to satisfy the court that there were sufficient grounds in fact and in law for the caveat to be removed.

(2) On the evidence as it stood, no adverse inference could be drawn against the respondent for failing to object to the creation of the charge in favour of Singapore Finance Ltd by the registered proprietor of which he was then a director in the light of the fact that the five-year period had not expired or for failing to intervene in the foreclosure proceedings brought at the instance of Singapore Finance Ltd against the registered proprietor in the light of the caveat whose very function is to prevent the respondent's interest from being overridden by any interest acquired subsequently in respect of the land.

(3) The respondent was clearly entitled to enter the caveat as it was abundantly clear from the authorities that so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

(4) Too much stress had been placed on the status of the certificate of sale issued by the court after the completion of the judicial sale as against the sale and purchase agreement executed by the respondent because of the characterization given to it in s 267 of the National Land Code 1965 relating to the effects of a sale by public auction. The comparison should have been made not between the status of the certificate of sale and that of the sale and purchase agreement but between the former and the status of the caveat lodged by the respondent.

(5) The effect of s 267 of the National Land Code 1965 is that until registration the applicant's certificate of sale, although characterized statutorily as an instrument of dealing, does not per se enhance the applicant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override, the respondent's priority of interest established by the caveat.

(6) Although it is clear on the authorities that one's prior equity can be defeated or postponed by some act or omission on one's part, the facts in this case cannot be considered to have rendered it inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the land subject expressly to the caveat.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-255 of 1990.]

Cases referred to

1 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (folld)
2 *United Malayan Banking Corp Bhd* v *Goh Tuan Laye & Ors* [1976] 1 MLJ 169 (refd)
3 *Macon Engineers Sdn Bhd* v *Goh Hooi Yin* [1976] 2 MLJ 53 (folld)
4 *Crosbie-Hill* v *Sayer* [1908] 1 Ch 866 (refd)
5 *Abigail* v *Lapin* [1934] AC 491 (refd)
6 *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104 (refd)

Legislation referred to

National Land Code 1965 ss 267, 327

Zainab Jan bte Abdullah Ghafoor for the applicant.
Mohd Shariff bin Mohd Ali for the respondent.

Cur Adv Vult

LC Vohrah J: The applicant has moved the court under s 327 of the National Land Code 1965 to direct the Pengarah Tanah dan Galian, Johor, to remove a private caveat filed on 25 March 1986 by the respondent in respect of land held under HS(D) 23635 PTB 8647 in the township of Johore Bahru ('the said property') and also to register the applicant's certificate of sale issued by the registrar of the court on the successful completion of a judicial sale.

From the affidavit evidence tendered by the applicant and the respondent and from the related files referred to therein, the following facts have been established. The said property is a 4-storey shophouse at No 6E, Jalan Larkin, Johore Bahru. It was registered in the name of Tanjong Petrie Enterprise Sdn Bhd ('Tanjong Petrie'). On 10 April 1980, Tanjong Petrie granted an option to purchase the said property to one Shaikh Mohamad bin Shaikh Tahir, who was then one of its directors, at the price of $199,750 in the following terms:

> In consideration of the sum of $39,950 (Ringgit thirty nine thousand nine hundred and fifty) only paid by you to us (the receipt of which sum we hereby acknowledge), we hereby grant you an option to purchase the abovementioned property upon the following conditions:
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> (1) the purchase price shall be $199,750 (Ringgit one hundred and ninety-nine thousand seven hundred and fifty) only;
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> (2) the sum of $39,950 shall not be refunded should you fail to exercise the option during the period stated below but should you exercise the option, the sum of $39,950 shall be treated as part payment towards the purchase price;
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> (3) this option shall only be exercised after the expiry of five years from 1 April 1980 (ie after 1 April 1985) and before 30 May 1985 by 4pm by paying a further sum of $39,950 towards the purchase price to Messrs Nathan & Yang, Advocates & Solicitors of No 16C, Third Floor, Tan Chan Cheng Building, Jalan Station, Johore Bahru, who are our solicitors or to any solicitor appointed by us;
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> (4) the final balance of the purchase price shall be paid within three (3) months of the exercising of the option;
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> (5) all quit rent, assessment and other outgoings as from 1 April 1980 shall be paid by you to the appropriate authorities;
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> (6) the said property shall be maintained by you in good order and repair and you should not in any way breach any rules or regulations of the local authorities;
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> (7) you are at liberty to rent the premises to your tenants;
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> (8) in the event of your failing to exercise this option within the time stipulated you are to deliver vacant possession to us forthwith;
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> (9) this option shall be binding on our respective assigns, beneficiaries, nominees and representatives.
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> Dated this 10 April 1980.

On 15 November 1981, the said property was however charged by Tanjong Petrie to Singapore Finance Ltd at a time when Shaikh Mohamad was still a director of Tanjong Petrie. Pursuant to the option granted to him, Shaikh Mohamad had appointed the respondent, of which he is a director, as his nominee and a sale and purchase agreement (SMST-2, encl 5) was entered into on 29 June 1985 between Tanjong Petrie and the respondent in pursuance of which the respondent made two further payments of $39,950 on 29 June 1985 (SMST-2, encl 8) and of $41,075 on 5 July 1985 (SMST-3, encl 8) leaving a balance of $78,775 to be paid in respect of the purchase price. On 5 January 1986, Shaikh Mohamad's solicitors wrote to the solicitors of Tanjong Petrie informing them that the respondent was ready and able to pay the balance sum upon Tanjong Petrie making available the title deed to the said property for its transfer to the respondent as follows:

> We refer to the abovementioned matter. We are instructed to inform you that the further negotiation between our client and your client sometime in November 1985 was that within one (1) month thereafter your client was to make the title deed to the property available for our further action. One (1) month has since passed.
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> We wish also to stress that the transfer document has been adjudicated and ready for registration and further our client is ready and able to forward your client the difference in the purchase price amounting to $78,775. We have therefore been instructed to give you one (1) month's notice from the date hereof to have the title deed ready upon our client forwarding your client the balance of the purchase price failing which our client has given us instructions to commence legal proceedings against your client for specific performance and/or alternatively damages for breach of contract.

On 1 April 1986, the respondent made a further payment of $50,000 (SMST-4, encl 8) leaving a balance of $28,775 still to be paid. On 25 March 1986, the respondent lodged a private caveat in respect of the said property and on 9 September 1986, an action was filed by Shaikh Mohamad and the respondent against Tanjong Petrie in CS No 22-1158-86 in the Johore Bahru High Court for specific performance of the sale and purchase agreement and for delivery of the title deed. On 4 February 1987, Shaikh Mohamad and the respondent obtained an order (SMST-4, encl 5) from the senior assistant registrar for, inter alia, judgment to be entered against Tanjong Petrie in default of defence and for Tanjong Petrie to deliver the title deed of the said property to the respondent. That order still stands. Shaikh Mohamad has been in possession of the property since 10 April 1980 when the option to purchase the said property was given to him and only resigned as director of Tanjong Petrie on 30 April 1985 well after the said property was charged to Singapore Finance Ltd. The said property was put up for public auction at the instance of Singapore Finance Ltd in foreclosure action Originating Summons No 31-71/87 for non-payment of the principal sum and interest despite repeated demands. The applicant was the successful bidder at the public auction on 2 July 1989 and on full payment of $260,000 having

been made, the certificate of sale by the court was issued by the senior assistant registrar on 7 November 1989. The certificate of sale could not be registered because of the private caveat which had been lodged by the respondent. The proclamation of sale in respect of the public auction of the said property however had the following description:

> Caveat: PTB 8647
> Private Caveat entered by Almurisi Holding Sdn Bhd vide Caveat Serial No 681/86 Jilid No 228, Folio 26 dated 25 March 1986.

As the applicant, not being the registered proprietor, has made this application under s 327 of the National Land Code 1965, it has to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be removed: see *Eng Mee Yong & Ors* v *Letchumanan*.[1] Counsel for the applicant argues that it is aggrieved by the existence of the private caveat because although it has paid the full purchase price it has been unable to register the certificate of sale and contends that the option granted to Shaikh Mohamad was not a bona fide transaction because 'as a purchaser cum director of' Tanjong Petrie Enterprise Sdn Bhd he should have objected to the charging of the said property in favour of Singapore Finance Ltd and that as he must have had either full knowledge or constructive knowledge of the charge when he signed the sale and purchase agreement on 29 June 1985 on behalf of the respondent, its caveat 'is bad in law and void of any effect and ought to be removed'. She also argues that if the court should consider that the respondent does have a caveatable interest, then the question of two equities arises in which event on the authority of *United Malayan Banking Corp Bhd* v *Goh Tuan Laye & Ors*[2] relating to competing equities which had not been registered, the applicant having paid the full purchase price and having in its possession the title deed to the said property has a better equity as bona fide purchaser whereas the respondent had been guilty of omission in not objecting to the creation of the charge and in not intervening in the foreclosure action. In reply counsel for the plaintiff argues that no evidence has been adduced to show that the granting of the option to purchase the said property was not bona fide and pointed out that the option could not have been exercised for five years from the date it was given and that at the time the charge was created on 15 November 1981, Shaikh Mohamad had about another four years to wait before he could exercise his option. He also argued that on the authority of *Macon Engineers Sdn Bhd* v *Goh Hooi Yin*[3] relating to a purchaser's entitlement to enter a caveat to protect his rights under a valid agreement for the sale of land, the respondent was entitled to enter the caveat and that accordingly the burden was on the applicant to show that the respondent had wrongfully caveated the said property. He argues further that the predicament in which the applicant has found itself in is the result of its own doing in ignoring the fact that the proclamation of sale had specifically described the said property to have been encumbered with the caveat so that the respondent with the prior equity which has been registered is entitled to have the application dismissed with costs.

It has not been possible for me, on the affidavit evidence that has been presented by the applicant, to make a finding as to whether the granting of the option by Tanjong Petrie to Shaikh Mohamad was a bona fide transaction or not. Nor do I think, on the evidence as it stands, that any adverse inference can be drawn against the respondent for failing to object to the creation of the charge in favour of Singapore Finance Ltd by Tanjong Petrie of which he was then a director in the light of the reason given by counsel for the respondent (as stated earlier) to the effect that the five-year period had not expired or for failing to intervene in the foreclosure proceedings brought at the instance of Singapore Finance against Tanjong Petrie in the light of the caveat whose very function is to prevent the respondent's interest from being overridden by any interest acquired subsequently in respect of the said property. That the respondent was entitled to enter the caveat is clear from the case of *Macon Engineers Sdn Bhd* v *Goh Hooi Yin*[3] wherein Gill CJ (Malaya) stated at p 54:

> It would seem abundantly clear from the authorities that, so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

Counsel for the respondent has put much stress on the status of the certificate of sale issued by the court after the completion of the judicial sale as against the sale and purchase agreement executed by the respondent because of the characterization given to it in s 267 of the National Land Code 1965 relating to the effects of a sale by public auction, the relevant provisions of which read as follows:

> (1) Any certificate of sale given to a purchaser under sub-section (3) of section 259 or sub-section (4) of section 265 in respect of any charged land or lease shall be treated for all the purposes of this act as *an instrument of dealing*, and shall be registrable accordingly under Part Eighteen; and, *upon the registration thereof* —
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> (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto; ... (Emphasis added.)

The comparison, in my view, should be made not between the status of the certificate of sale and that of the sale and purchase agreement but between the former and the status of the caveat lodged by the respondent. The effect of the above provisions, in my view, is that until registration the applicant's certificate of sale although characterized statutorily as an instrument of dealing does not per se

enhance the applicant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override, the respondent's priority of interest established by the caveat. Although it is clear on the authorities (*Crosbie-Hill* v *Sayer*,[4] *Abigail* v *Lapin*[5] and *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor*[6] to name a few) that one's prior equity can be defeated or postponed by some act or omission on one's part, I fail to see how the facts in this case can be considered to have rendered it inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the said property subject expressly to the caveat.

This motion is accordingly dismissed with costs.

Motion dismissed.

Solicitors: *TK Lim & Co; Shariff & Som.*

Reported by *Yap Shao Sin*

Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CODE NO D4-25-60-1989
ZAKARIA YATIM J
10 APRIL 1990

Civil Procedure — Arbitration — Application for order to decide locus standi of party to arbitration — Jurisdiction to make order — Arbitration Act 1952, s 34

Arbitration — Regional Centre for Arbitration — Supervisory function of court — Whether exercisable — Arbitration Act 1952, s 34

The applicant and first respondent are parties to a contract dated 25 May 1985 relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between the parties and according to cl 37 of the contract the dispute has to be settled by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration in Kuala Lumpur (hereinafter referred to as 'the Arbitration Centre'). Pursuant to the said clause, the parties submitted their dispute to the Arbitration Centre for arbitration. The arbitrators were duly appointed and the parties filed their pleadings. During the adjournment of the arbitration proceedings, the applicant filed an application for an order of the court, inter alia, that the applicant be at liberty to continue the counterclaim against the first respondent, pending in the Arbitration Centre, which proceedings were commenced by the second respondent, as receivers and managers of the first respondent, notwithstanding the order to wind up the first respondent.

Held, dismissing the application:

(1) It is clear that under s 37, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law. The words 'written law' include the Companies Act 1965.

(2) Therefore, the question of capacity or locus standi of a party to the arbitration, the question of security for costs, or the issue of pleadings before the arbitral tribunal, cannot be determined by the court by virtue of s 34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceedings of the tribunal.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-196-90.]

Case referred to
1 *Goldsack* v *Shore* [1950] 1 KB 708 (refd)

Legislation referred to
Arbitration Act 1952 s 34

Cecil Abraham (*Julian Ding* with him) for the applicant.
D Puthucheary (*Chia Loong Thye* with him) for the second respondent.

Cur Adv Vult

Zakaria Yatim J: This is an application by the applicant for an order of the court:

(1) that the applicant be at liberty to continue the counterclaim against the abovenamed first respondent, now pending in the Regional Centre for Arbitration, Kuala Lumpur, before an arbitral tribunal, chaired by Mr Francis McWilliams, which arbitration proceedings were commenced by the abovenamed second respondent, as receivers and managers of the first respondent, pursuant to s 226(3) of the Companies Act 1965, notwithstanding the order to wind up the said first respondent dated 15 August 1989;

(2) that the abovenamed second respondent do provide security for the costs of the arbitration proceedings on a complete indemnity basis, in the sum of $400,000 pursuant to s 351 of the Companies Act 1965;

(3) that it be determined whether on the proper construction of the debenture exhibited in the supplementary affidavit, the second respondent has the power to continue with the arbitration commenced at the Regional Centre for Arbitration.

The applicant and the first respondent are parties to a contract dated 25 May 1985 relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between the parties, and according to cl 37 of the contract the dispute has to be settled by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration in Kuala Lumpur (hereinafter referred to as 'the Arbitration Centre'). Clause 37 states as follows: